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# United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 15,547

CIVIL.

UNITED STATES OF AMERICA,
APPELLANT,

vs.

LATROBE CONSTRUCTION COMPANY, BRAGG'S ELECTRIC CONSTRUCTION COMPANY, ARKANSAS FOUNDRY COMPANY, GENERAL STEEL PRODUCTS COMPANY, JEFFRY LUMBER COMPANY, PADGETT LUMBER COMPANY, CHOCTAW, INC., IRA SHERRILL, MILL & MINE SUPPLY COMPANY AND CROW-BURLINGAME COMPANY, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS**

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## INDEX.


| | Original | Print |
|---|---|---|
| Excerpts from Transcript of Testimony | 2 | 1 |
| Testimony for United States | 2 | 1 |
| George B. Holderer | 2 | 1 |

| | Original | Print |
|---|---|---|
| Statement by Court | 2 | 1 |
| Arthur L. Sherman | 5 | 3 |
| Government's Trial Exhibit 11, Memorandum of John G. Ford, Director of the Contract Negotiations Divisions of DMPA, to Howard I. Young, Deputy Administrator of DMPA, dated April 10, 1952, discussing Government's Contract with Westmoreland Manganese Corporation | 12 | 10 |
| Clarence J. Koontz | 13 | 10 |
| Trial Exhibit 22, Letter, Harry E. Meek to Albert H. Green, General Counsel, Defense Materials Procurement Agency, June 19, 1952 | 14 | 11 |
| Testimony for Westmoreland Manganese Corporation | 17 | 13 |
| W. S. Stringham | 17 | 13 |
| Testimony for Bragg's Electric Construction Company | 18 | 14 |
| George Morrison | 18 | 14 |
| Testimony for Crow-Burlingame Company | 23 | 18 |
| R. M. Knox | 23 | 18 |
| Testimony for Creditors | 25 | 20 |
| E. H. Moore | 25 | 20 |
| Conclusions of Law requested by United States of America | 26 | 21 |

[fol. 2] (Excerpt from Transcript of Testimony.)

GEORGE B. HOLDERER, Witness for Government, testified: (Tp. p. 184)

The Court: "Gentlemen: I am going to make this statement, and then it (Tr. p. 184) is up to you as to your own stipulations. Supppose a situation like this arises, just suppose that Westmoreland owes Latrobe $50,000.00 for work and material on certain buildings, and that building is concrete and steel structure and that cannot be removed from the land from a practical standpoint: within that building there might be all kinds of fixtures that could be removed from the building, I mean from a practical standpoint they could be removed from the building, because I don't think the technical law of fixtures applies here. In other words, if Latrobe can go in there and take its stuff out, that it would have a lien prior to the Government; of course, if it can't take it away, if it is concrete and steel and you just can't remove it, that lien would not do you any good. If it were a wooden structure, however, something that could be removed or rolled off the land, then it would be a different proposition. Under certain conditions, you know there is a different statute with material-men's lien and Mechanic's Liens are concerned, the statute provides a small tract of land to go with the lien; that is not the case in a Miner's lien; this is not quite as simple as it seems to work, this whole proposition."

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My name is George B. Holderer and my address 316 North Adams St., Arlington, Va. (Tr. p. 185) I am a mining engineer on the staff of the Committee on Interior and Insular Affairs, of the United States Senate and have been such for two years. I have had mining engineering, graduated from School of Mines at Columbia University and for close on to fifty years have been closely identified with

probably every phase of the mining industry, both as operating manager, consultant, connected with the financing of mineral properties, my activities ranging over the entire western hemisphere, except Alaska. The Committee on Interior and Insular Affairs has jurisdiction of the Executive end of the Government that has to do with the Depart-[fol. 3] ment of the Interior and we have five sub-committees. (Tr. p. 186) During the past thirty years I have been employed as manager by General Chemical Co. as manager of one of the largest mines in Canada; was with Air Reduction Co. for ten years on research work having to do with mining engineers and developed liquid oxygen explosives. As consulting engineer I worked for dozens of indiduals and companies such as Anaconda Mining and International Nickle. During World War II I served in the War Production Board in the Copper division and at end of war resumed private consultant (Tr. p. 187) work. At beginning of 1951 I was asked to come into the Defense Minerals Administration. Defense Materials Procurement Agency, known as D.M.P.A. in 1951 became a part of General Services Administration. Mr. Young was a deputy administrator and I became Chief of Ferro-Alloy Division. (Tr. p. 188) The Westmoreland project was assigned to me in February, 1951, it having come to the attention of my Chief, Mr. Bradley, late in 1950. I was concerned with alloys that go into making of steel etc. My job was to examine Westmoreland's application and see what was needed to make it effective. I visited the project in April to get the lay of the land and nature of conditions, spending one week in April (Tr. p. 189) 1951. I dealt almost entirely with the attorneys for the company in Washington. The Batesville area has been known for a hundred years as a producer of manganese in a small way. The geological survey stated an immense area was covered with a low grade material carrying manganese. When I visited the property in 1951 I found the company had a buldozer making a cut through part of the property; that was followed by a man with water (Tr. p. 190) pails who would pick up the lumps of high grade ore, some run as high as 50%, but it was not a large scale operation. (Tr. p. 191). Mr. Howard Young on May 9, 1952, called a meeting with myself, Mr. Sherman, Mr. Ford and all the other technical men (Tr. p. 219) in which Mr. Young expressed doubt as to the ore reserves,

[fol. 4] but that no Government money had been spent, although the contract was signed, and asked all present to state any objections to the project. No one present objected. (Tr. p. 220) There were some 18 or 20 present in this meeting representing both the Government and the Company, and Mr. Young said "once we have entered into a contract with the company we do not propose to "breathe down your neck", meaning that we do not intend to supervise your operation; that, I was aghast at that statement. (Tr. p. 221) With reference to the report I made to the Contract Negotiations Division in which I said "this requires the closest supervision" (Tr. p. 223) which related to building of a plant by the Westmoreland Corporation for the mining activity; this report going through Mr. Sherman, Mr. Ford, Mr. Lyons and on up to Mr. Young. (Tr. p. 224) The purpose of the drilling operations was to show presence of ore over a large area, and it was contemplated that ore would be removed from a large area of the Westmoreland holdings as a single unit in order for the Government to receive its money back. (Tr. p. 225) There could not be any mining or recovery of ore until the mill was in operation.

"Q. And the mill would be an integral part of this mining enterprise."

"A. A very, very necessary part."

"Q. Perhaps the most important part?"

"A. I won't say the most important, but you cannot operate a mine without a mill, you can't operate a mill without a mine, the two put together." (Tr. p. 227)

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[fol. 5] ARTHUR L. SHERMAN, witness for United States:

Cross-Examination.

By Mr. Murphy, Attorney for Creditors:

(Transcript pages 428 to 451, inclusive)

Westmoreland plant was the only manganese plant I know of built with Government advances. After the April 7, 1952, contract agreement no Government representative

was placed at the plant site, because Mr. Harold Young refused requests for same. (Tp. 429) With respect to the Westmoreland plant "I was vested with authority with what we call the administration of the contract, which was in effect making reasonably sure that the provisions of the contract binding on the Government were carried out, and the provisions binding on the contractor were carried out; I had no jurisdiction with respect to operations. (Tp. 430) "I did arrange to send a man down there for a few days in September in connection with other work which he was going to Batesville, and his report was submitted within a week or ten days, and we sent another man down in November; neither one of them was to stay full time. (Tp. 431) Paragraph 5 (c) of mortgage is read, with following questions and answers:

"Q. Now, my question is this, did you, as a Government representative, feel that you had no obligation at all to see that those funds advanced by the Government were used to pay creditors?

"A. No, sir.

"Q. All right, you felt entirely free of any obligation to pursue the inquiry as to whether or not Westmoreland spent the money wisely or foolishly?

"A. We had no obligation to Westmoreland to do that Sir.

"Q. My question was not that; my question was did you feel any obligation to the creditors?

"A. No, sir.

"Q. And I presume if you felt any obligation you did nothing in any way at any time that would protect these [fol. 6] materialmen or suppliers, is that correct

"A. I am unable to say what could have done." (Tp. 432)

I was at the plant site Feb. 9th and 10th, 1953, and recall seeing steel there, but don't know whether I inquired specificially if it had been paid for.

"Q. Now, it developed that there was an over-run of approximately half a million dollars at the time you were there in February, 1953?

"A. Yes, sir.

"Q. Now, had you made any investigation at all to determine when that over-run occurred?

"A. It was an accumulative over-r..., of course.

"Q. Over how many months?

"A. I don't know, I have no way of knowing.

"Q. If there had been one or more Government representatives on the job from April 7, 1952, up until the time that you were there and if they had an opportunity to see the boo'ks of the company would it not be that the present deplorable situation (Tp. 433) in which the creditors have not received payment would not have occurred?

"A. I can't answer that, Sir.

"Q. You mean that a man on the job with access to the books could not determine whether or not these people were being paid?

"A. You could determine whether or not they were being paid, but we had no jurisdiction with respect to paying them.

"Q. Would you have expected him to report that to you?

"A. Yes, sir.

"Q. What would you have done?

"A. Called the people on the "carpet."

"Q. Called Westmoreland?

"A. Yes, sir.

"Q. Would have made further advances having knowledge of that?

"A. I can't answer that.

"Q. Did you make or approve an advance of three hundred thousand dollars in February, 1953 after you had knowledge of that?

"A. No, sir, it was approved in January.

[fol. 7] "Q. It was approved in January, but it was not paid until February, is that correct?

"A. That is correct.

"Q. After your visit there?

"A. No sir; I think it was paid during my visit there to be [presise]. (Tp. 434)

"Q. Oh, it was paid while you were on the grounds?

"A. Yes, sir.

"Q. Now, the mortgage provides "That you", Westmoreland, "shall furnish the Government with unencumbered and unqualified mortgages covering new facilities

and all mining properties presently owned by you"; whose responsibility was it to give to the local department of GSA the list of the new equipment that was acquired by Westmoreland?

"A. As I recall, the legal division obtained it themselves, but I am not sure.

"Q. Did you say that it was not any responsibility of the division in which you operated.

"A. That is right.

"Q. How, then, did you expect the legal department to acquire this information, and from whom?

"A. I would expect them to acquire it from the contractor. (Tp 435)

I don't think I have ever read the supplemental mortgage and do not know the terms of it. I did not think it essential for me to acquaint myself with the terms of it. (Tp. 438) The Government had no representative in Batesville with [whome] creditors could consult. He could go to the Administrator of D.M.P.A. and [thought] him find the proper party to answer the question. (Tp. 439) Mr. Ford, as Director of the Contract Division was responsible for administration of the Westmoreland contract, and I was his deputy. Within a few days after the execution of the Westmoreland contract in a GSA conference responsible for negotiation of the contract I wrote a memorandum containing the following language: The low estimation in [fol. 8] which the contractor was held by those that participated in the contract negotiations was succinctly expressed by one of them three days after the contract was signed, as follows: "We have progressed from an instinctive "there is something wrong here at the start of negotiations but have considered that the whole outfit will bear watching since of necessity there will be many opportunities to increase costs and decrease recovery at the proper times to affect price adjustment in what is practically a guaranteed profit contract." (Tp. pp. 440-442, Incl.) Notwithstanding all the matters that appear in this report, a further advance of over three hundred and forty-four thousand dollars was made February 12, 1953, to Westmoreland. (Tp. 442) I have already stated that had I known all the facts I would have acted differently, and if a representative had been there on the job I would have had

a substantially better opportunity to know the facts. Westmoreland had no control of any kind as to whether the Government had a [represenative] on the job (Tp 443): that was a decision solely and only of the Government. As to standard procedure on a three million dollar contract as to allowing passage of six months without having a Government man on the job to view progress, that is a decision for the Government to make, and there is no such thing as standard procedure. (Tp. 444) If it exists, it was not followed in this case. I did not approve or reject employment of the engineers and made no objection to their payment. (Tp. 445). I do not know under what appropriation of Congress DMPA acquired funds to be used in the mortgage advance. (Tp. 446.) I have no knowledge of paragraph 4 of the supplemental mortgage. (Tp. 448) I was administering the contract.

"Q. I understand you were administering the contract, but I I am asking is if you took any steps of any kind to see if Westmoreland complied with its provision of the contract; if you did, is it a yes or no answer.

"A. It took several steps, I was not successful.

"Q. All right, will you name those steps.

"A. Well, we required—let's go back a bit—we re- [fol. 9] quired a competent manager, we had the general belief that the company would complay with their tacit agreement to that effect, we had no reason to believe to the contrary, we received from them certifications at intervals which are called cash flow sheets, which stated uniformly the plant would be completed within the funds available and that in itself is a very good indication that the contractor is carrying on his work in accordance with the plans; we had perhaps occasion after a while to doubt the situation to the point that we checked into it, but we did have a contract with the company and they were obligated thereunder to produce certain things, the fact that we didn't catch them in the act soon enough is unfortunate, is all."

"Q. But you did catch them in the act to your knowledge as early as October, 1952, did you not, Sir?

"A. We had suspicions which we had to verify and carry on and (Tp. 449) we were as anxious as anybody would be to see the thing succeed, we didn't know in October and we had the assurance of the General Manager that the

Plant, at least the mill and so on would be completed one hundred thousand dollars below the estimation which was good enough, he knew better than we.

"Q. The point is that you were relying entirely on the assurance made to you by Westmoreland, but without any independent supervision or audit or check?

"A. That is right.

"Q. And that was your responsibility in administering, in making a policy decision as to what supervision or control was necessary?

"A. That was decided by the DMPA not to put a permanent man down there, as you know, by my superior.

"Q. The Government is made up of men and I am trying to put the responsibility somewhere and if that was not your responsibility I certainly do not want to place that responsibility on you.

"A. All right, it was taken away from me in that particular case.

[fol. 10] "Q. All right, on whom did it rest?

"A. Mr. Howard Young refused to let us send a man down there, he was deputy commissioner.

"Q. And you regard that as the crux of the whole issue so far as supervision is concerned. (Tp. 450)

A. Well, I take orders, Sir."

Mr. Howard Young, as the responsible officer in the agency, never issued any directive of any kind that [would] have stopped me from seeing that creditors were paid. (Tp. 451)

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"The responsibility for the administration of contracts negotiated by the Contracts Negotiation Division was delegated to that Division; the amount of supervision which was exercised with respect to individual contracts depended on the importance of the contract, the amount of money that the government had in the contract and other matters; I functioned purely ministerially in carrying out the administration of that contract, which was basically the problem of seeing that both the government and the contractor carried out their obligations under the contract; that respect to fiscal matters, that was handled by the fiscal people; with respect to legal matters, it was handled by the legal people." The Court: "Mr. Highsmith brought up a ques-

tion that has been in my mind since the beginning of the trial of this case, and sooner (Tr. p. 164) than it did."

The Witness "It is a complicated problem and we had a number of them at that time, but with respect to management I have testified to it as covered in the record that we required the contractor to provide competent management . . ."

The Court * * * would it not appear the government would have somebody on the ground or somebody whose duty it was to determine whether or not the contract was being fulfilled instead of waiting for months and months and then finding it out; as it appears you didn't find it out that the condition was such as it was until months and months after the work had (Tr. p. 165) begun. Now, that is something the Court is interested in knowing.

[fol. 11] Mr. Eisele: "There is furthermore a provision of the contract which says the Government did have the right to maintain one or more representatives at the site for access to the books and records of the corporation at all reasonable times, audit said books and records and observe the operation of the corporation, that was a contractural provisions."

"Q. Now, in a way I think the Court has asked you why you didn't utilize the rights under the paragraph."

The Witness: "On the day after the contract was signed Mr. Ford was here and requested the authority from the Deputy Administrator to place an auditory and an engineering representative at the site of the work to do exactly as you have pointed out, but Mr. Young refused, the man in charge refused to permit it." (Tr. p. 166)

Mr. Young was Deputy Administrator of DMPA, that was the basic control; and it was not until August or September that I found a way to get a man down here; I don't pass the blame, but that is the facts;" (Tr. p. 167)

[fol. 12] Government's Trial Exhibit #11.

This is a memorandum of Mr. John G. Ford, Director of the Contract Negotiations Divisions of DMPA, to Mr. Howard I. Young, Deputy Administrator of DMPA, dated April 10, 1952, discussing the Government's contract with Westmoreland Manganese Corporation of April 7, 1952, and which contains the following:

"The net result has been that we have progressed from an instinctive "there's something wrong here" at the start of negotiations to a considered opinion that the whole outfit will bear watching, since of necessity there are to be many opportunities to increase costs and decrease recovery at the proper time to affect price adjustments in what is, practically, a guaranteed profit contract."

"We concur in your viewpoint that in general it is inadvisable to maintain a continuous watch over our contractors. In this case we strongly recommend that a technically qualified [represenative] and a competent auditor be assigned full time to the project from the start of construction until we are certain that everything is operating satisfactorily, such representatives to keep their eyes and ears open and their mouths shut and to report direct to Washington. We do not question the business ability of the Company officials, but rather the way in which such ability will be applied. We believe that competent management can be secured. We are not convinced that it will be."

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[fol. 13] Clarence J. Koontz, witness for United States, testified:

I am an attorney for General Services Administration; have been an attorney since 1933 and with the Government since 1934; have held my present position since March 5, 1952. I had nothing to do with preparation of original letter contract (Tp. 745). I examined the contract the day it was signed. I was assigned the job of preparing the mortgage, but counsel for Westmoreland offered to prepare the initial draft, which, after conferences was modified as satisfactory to both parties (Tp. 746-747). On my recommendation the Government employed Mr. Harry Meeks of Little

Rock and papers were forwarded to him for closing. He advised a supplemental mortgage which we authorized and which he prepared (Tp. 748). Upon closing Mr. Meeks issued his opinion, stating that in his opinion the Government had a good and first mortgage lien on the assets of the company and had safe-guarded the interest of the Government in every respect (Tp. 748)

On cross-examination by attorney for creditors Mr Koontz further testified:

I did not prepare the contract of April 7, 1952. Preparation of original note and original mortgage was under my supervision (Tp. 833). Copy of the contract and all pertinent papers and information about the case were forwarded to Mr. Meek. I don't recall just what Mr. Meek said in his opinion and do not have a copy with me (Tp. 834). When the supplemental mortgage was completed Mr. Meeks proceeded with the execution, the recordation of the mortgage and final closing and then forwarded the papers to Washington with his opinion on the title (Tp. 835 6). No Arkansas attorney was consulted regarding Amendment No. 1. It was my intention in preparing Amendment No. 1 to relieve the Government from giving the 60 days notice in event of default after Amendment No. 1 (Tp. 837). Neither my office nor anyone acting under advice from my office took any steps to comply with Mr. Meek's letter of June 19, 1952 (Tp. 843-844).

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[fol. 14] Trial Exhibit #22.

Letter From Harry E. Meek

Dated June 19, 1952

Little Rock, Arkansas.

"Mr. Albert H. Green,
General Counsel,
Defense Materials Procurement Agency,
Washington, D. C."

. . . . . .

"With reference to liens which may hereafter result from the construction of the plant, please note the following: Under our Arkansas Statute where a mortgage is given to

secure a loan to finance the construction of an improvement, the mortgage takes priority over any statutory liens created in connection with the construction of such improvement. See Sebastian Bldg. & Loan Assn vs. Minten, 181 Ark. 700; 27 S.W.2nd 1011. However, in a situation of this kind I have always been afraid to rely 100% on this statute. It could be argued that this statute applies only when the proceeds of the loan are disbursed in one lump sum before construction commences, and does not apply to a situation where the mortgage proceeds are advanced from time to time as construction progresses. Therefore, I think that it would be advisable if, in connection with each future disbursement, some precaution be taken by the government to protect itself against currently accruing construction liens. Most certainly the Government's mortgage might fail as against removable installations of machinery which had been purchased under conditional sales contracts."

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[fol. 15] Mr. Patten (Atty. for Govt)

"Your Honor, at this time I think we might clarify the situation; the Latrobe Construction Company, the United States and Westmoreland have entered into a stipulation reducing the Westmoreland claim (should be Latrobe claim) from $314,471.33 to $137,580.00 based upon a Government audit of their cost, plus the usual percentage of overhead and profit, it is really on cost plus and the Government satisfied itself with cost; that stipulation is (Tr. p. 178) only as to the amount, and it does not involve priorities, of course." * * * "They are in the same position now as the other creditors, Your Honor, as far as the dispute is concerned."

The Court: "Now, here is what I am getting at, Gentlemen: I think my ruling will be that any creditor who holds a miner's lien on property which is subject to be removed from the realty, I mean physically subject to being removed, has a lien prior to the Government's mortgage on that particular property; they have a lien on the land, but it would be subject to the Government's lien on the land, the Government's mortgage on the land, but where material-

men or laborers furnished material which comes within the purview of the Miners' Lien Statute, [which] has not been paid for that [meterial], he can seize it and he can remove it from the land, if it is subject to removal, just like a house that might be put on rollers and rolled off the land, and his lien would be prior to the Government's mortgage on personal property, don't you see, [sp] that now is . . . (Tr. p. 180)

Mr. Patten: "Your Honor, with regard to the stipulation, of course, our general contention is they do not have a Miner's Lien superior to ours, but so far as this particular claim is concerned, this stipulation puts Latrobe exactly in the same class and position as the rest of the Lien Claimants in that if they are going to establish a Miner's Lien [fol. 16] they must establish all of the features . . . I mean, Sir, they must establish all of the factors that go to constitute a Miner's Lien. Now, we have admitted the amount." • • • "We don't admit they have a Miner's Lien; we admit that they have filed their proceeding under such and such a Statute; now, then, we don't want to admit as a matter of law that they have a Miner's Lien."

"Mr. McCaleb: (Atty. for Latrone) Do you intend to put them in the same category as the other lien claimants?"

"Mr. Patten: Yes, sir." (Tr. p. 182)

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[fol. 17] W. S. STRINGHAM, a witness for Westmoreland, testified:

Details [principals] upon which gravity recovery plants operate. (Tp. 1221 to 1222, Incl.) Further discusses process with the Court. (Tp. 1224 to 1227, Incl.) There was no basic change in the Westmoreland plant. Reads from Wroth report as follows:

"The flow sheet of the mill now in course of construction calls for a crusher followed by a series of log washers and screens. The crusher will be set at 4 inches (Tp. P. 1238) and all the minus 4 inch plus $\frac{1}{4}$ inch material will be washed clear of clay and will be sent to heavy media separation. The minus $\frac{1}{4}$ inch material will be screened to reject all

material finer than 35 mesh and the minus-$\frac{1}{4}$ inch plus 35 mesh material will be treated in the Dutch Cyclone. This is, in essence, a gravity separation process although employing the most modern treatment." (Tp. p. 1339)

This witness gave a detailed statement, and made detailed references to a map of Westmoreland mining lands, pointing out to the Court the area where drilling had been done and the stripping preparatory to mining and the location of Westmoreland valuable ore bodies in Independence County. (Tp p. 1359) Also details to the Court and points out on map the drill holes on Westmoreland properties as of March 15, 1952 and as revised to June 1, 1953. (Tp. p. 1360) Points out location where Westmoreland contemplated doing first mining; where drilling was done from November to March 1953; gives names of the different mines involved and what work had been done around the various mines. (Tp. pp 1361 to 1369, Incl.)

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[fol. 18] GEORGE MORRISON, a witness on behalf of Bragg's Electric Construction Company, testified as follows:

That he is employed by Bragg's Electric Construction Co. as Secretary-Treasurer and has been with Bragg's for twelve years. That he has a degree in electrical engineering from the University of Minnesota. That he first heard of the Westmoreland Cushman Plant Construction through one of the salesmen for one of the local wholesale houses who travels the state and when he heard of it, he contacted Mr. Holloway of Westmorelands. (Tr. 1543) That he subsequently received a request to bid on the electrical work at the Cushman Plant from the Engineers in Birmingham, which request was accompanied by the customary plans and specifications. Understands that Fagan Electric Co. also bid on it and some electrical or construction company in Birmingham and some others. That he, the witness, prepared the bid for Bragg Electric. This bid was prepared from a careful analysis of the materials and quantities and estimated labor necessary to install the equipment. (Tr. 1544) Followed the normal procedure in preparing the estimate and bid the job just like any other job. After our bid was submitted, I saw Mr. Holloway, who was Vice-Presi-

dent of Westmoreland at that time and he said our bid was 10% low. (Tr. 1545) On October 8th we received a notice that we had been awarded the job. This was in the form of a letter from Mr. O. E. Sellars, President of Westmoreland. We then did a little checking into the situation to see about the Westmoreland corporation and found there was a substantial sum of money being put into the pot by the Government and some small portion of the money by private capital, which totaled, I believe, some four and a half million dollars and with that as a background, we believed there [fol. 19] was evidence enough of good faith to assure payment of our contract. Then we checked with you (Mr. Henderson, Attorney for Bragg who was conducting the examination of Mr. Morrison) and asked you to find out about it. (Tr. 1546) The first contract submitted to us contained information in regard to the financing of the project. This information in the preliminary contract submitted to us by Westmoreland was as follows:

"Whereas, the Owner is under contract dated April 11, 1952, with the United States of America, acting through the Defense Materials Procurement Agency, to deliver 264,000 long dry tons of manganese ore, such production to commence not later than April 7, 1954, the ore to be processed through a washing and concentrating plant; and,

"Whereas, under said contract the Government has agreed to advance the necessary funds to establish and construct, among other things, a washing and concentrating plant for the processing of said manganese ore. * * *"

We asked you, Mr. Henderson, as our attorney, to check with Mr. Highsmith the recitals in that contract and you subsequently advised us you had talked with Mr. Highsmith; that there had been worked out a system of countersignature on Government checks and we would be paid direct, and we took all of that into consideration before signing the contract. It is accepted practice in Arkansas, established in the trade, to furnish labor and materials to owners who do not have their own capital but rely upon advance of funds by a lending institution. I would say ninety per cent of the contracts in this state are handled in that manner and it is not at all an unusual thing. It is customary

also to make inquiry of the lending institutions and verify the facts and we did so in this case. I personally supervised the work at Westmorelands. (Tr. 1548) Made no inquiry direct to Mr. Chapman before entering into and signing the contract. My information was that the Government was to advance $3,700,000.00 and Westmoreland was to put in $800,000.00, and I did verify the [existance] of the April 7th letter agreement. (Tr. 1549) I supervised the work personally, being there about two days each week from the time we started the work. I stayed personally on the job [fol. 20] because Mr. Holloway had told me we had bid too low. Our work was the complete electrical work of the plant and we started with the design and lay-out on the transformer on the sub-station adjoining the washing plant. From that point we built a pole line running down through the area past the heavy media and Dutch cyclone building, then to the cafe building and the pump house, where we placed the motors and made connection to the motors at the pumps. We installed heavy switch gear incidentally with the operation of the 2300 volt motors. (Tr. 1550) We actually installed the motors in the pump house. In the washer room we built a switchboard and fabricated a switch boom forty feet long and mounted such things as circuit breakers, capacitors, grids, drum controls, magnetic starters. From these pieces of electrical equipment we ran and installed conduit to the under washers, screen scalpers in the washer plant. All of the energy to be used in the plant was electrical energy. (Tr. 5051) Everything upon which we performed work can now be removed from the premises with the exception of a few conduits which were embedded in the slab of the washer plant. I personally prepared the exhibit of the Stipulation. It shows the various items Bragg performed work upon and furnished materials and Bragg actually did perform work on each of these items and each of them can now be removed. (Tr. 1552) Some of them have been removed by the Receiver. Some of the motors are now in the Multi-Quonset Building in dry storage. After undertaking performance of our contract, we were partially paid; we submitted estimates based on percentage of completion of component parts of the work. Our requests for monthly payments were submitted to the Resident Engineer on the job in Cushman at Batesville and they were passed to West-

moreland for payment. (Tr. 1553) The checks given us for payments were made out in Batesville and signed by an [fol. 21] officer of Westmoreland and then sent to the G.S.A. Office in Dallas where Mr. Chapman counter-signed them and returned them directly to Bragg's. I didn't personally talk to Mr. Chapman in Dallas, but you, Mr. Henderson, talked with him on two occasions when I was in your office. (Tr. 1554)

By The Court:

I believe Westmoreland stipulated those claims are just.

Mr. Goodwin, Attorney for Westmoreland:

He stipulated just that. (Tr. 1554)

On March 9th we submitted a progress statement in the amount of $7,637.72, which was allowed by the Engineers. Our lien in the amount of $15,700.13 includes $6,347.62 which represents 10% hold-back from the advancement by the Government of amounts known and admitted to be due to Bragg's. (T. 1555)

Cross-Examination.

I would say that everything we worked on, with the exception of the Multi-Quonset Building, where we had some conduit, much like wiring in a house in plaster, would be removable.

Redirect Examination.

Except in the Multi-Quonset Building, everything is run exposed and I will say that except for the conduit embedded in the washer plant, the concrete floor, everything else is removable.

Recross-Examination.

We actually moved some of the motors in the pump house —set them in place. We set these motors on the pump bases. Trued up shafts, put the belt on. (Tr. 1557)

It was agreed that Mr. Henderson, Attorney for Bragg's Electric Construction Company, if called as a witness,

would testify: "On February 18th he called Mr. Chapman in his office in Dallas, as he was principally concerned with actually getting a counter-signature upon a check for some $20,000.00 and also discussed with Mr. Chapman the method [fol. 22] whereby they would receive future checks and that Mr. Henderson's testimony would in no way be contradictory to the testimony Mr. Chapman gave on his examination, but supplementing such testimony of Mr. Chapman Henderson would testify that he advised that extras under the contract would be paid in exactly the same manner, and, after a brief interval when he left the telephone and checked figures, he advised him that 'we need have no concern about extras, so long as they did not exceed $10,000.00. That Mr. Henderson called Chapman again in Dallas on March 7th to discuss rumors in reference to the job being about to fold up, and he asked Mr. Chapman if he knew anything about it and he said he did not. He told Mr. Chapman they didn't want to continue the work up there unless they were going to get paid for it, and he stated in reply he had no knowledge whatever about any shut down or prospective shut down, and after our approved invoices were received, we would promptly get our money. Thereafter, on the basis of that information Mr. Henderson advised Mr. Morrison of Bragg's to continue to fulfill his contractual obligation." (Tr. 1560-61)

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[fol. 23] R. M. Knox, a witness on behalf of Crow-Burlingame Company, a lien creditor, testified as follows:

He is credit manager for Crow-Burlingame Company and has been such for twenty-five years and was called on to approve Westmoreland for sales on credit (tr. 1564) when orders from Westmoreland were submitted; this was August 26, 1952. He investigated through Dun & Bradstreet and then followed this up by personal call to Mr. R. B. Chapman, Regional Disbursing Officer of G.S.A. at Dallas (tr. 1565).

On August 26, 1952, he called Chapman and told him that they wanted to sell Westmoreland but were not able to get much information; that Chapman was rather evasive but did say that Westmoreland was building a plant and the

Government was furnishing the money and that "disbursement would be made through the Dallas office, and that we had no reason to worry about our money" (1566-7). On that statement of Mr. Chapman, he approved Westmoreland for credit and invoices as the account progressed from August 26, 1952 were forwarded to Dallas and checks were issued over Mr. Chapman's signature and the signature of one of Westmoreland's officers.

In the beginning the account was prompt and then it began to get a few days late and "at the last we just didn't get any money at all" (tr. 1567).

He talked to Mr. Chapman again when the checks were late and Chapman said that part of the invoices had been approved and checks would be sent and the checks were sent and received by Crow-Burlingame Company (tr. 1568)

On February 25, 1953 he called Mr. Chapman about the amount then owing Crow-Burlingame in the sum of $3,918.05 and Chapman said the invoices were being processed and as far as he knew they were all right and Crow-Burlingame would be getting a check. We never got those checks and that amount together with some other little additional items constitutes Crow-Burlingame's present account and lien claim.

Later, Knox testified, that he had a Crow-Burlingame representative check the Crow-Burlingame merchandise in Westmoreland's warehouse at Batesville for the purpose of [fol. 24] taking it back for credit, but between the time the check was made and the time when they sent a representative up to get it, a Government representative had come into the plant and would not let Crow-Burlingame have it. (tr. 1571) The prices charged by Crow-Burlingame were catalogue prices set up by the manufacturer with some times a discount of 5% to 10% on [quanity] purchases.

Cross-Examination.

On cross-examination Mr. Knox testified that his investigation disclosed that the Government was advancing funds to Westmoreland under a loan.

Q. You knew all the time Westmoreland Manganese Corporation was building that plant out there and not the Government?

A. They were building it under the supervision of the Government.

Q. Well, you don't know that as a fact, do you?

A. That is the information I received through Mr. R. B. Chapman and other channels.

Q. You previously told us about Mr. Chapman; do you claim that it was under the supervision of the Government?

A. That is right.

Q. Do you know how Mr. Chapman knew?

A. No, Sir.

Q. That the Government was supervising construction up there? A. That is right.

Q. What telephone conversation was this?

A. The one on August 26th.

Q. The first one? A. 1952, that is right.

All of the purchase orders were from Westmoreland. (tr. 1578)

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[fol. 25] E. H. Moore, a witness on behalf of creditors, testified as follows:

He was work's accountant and finally chief accountant for Westmoreland Manganese Corporation. This witness testified as to the flow sheets and the various amounts set up and agreed upon for construction and working capital, land acquisition, etc. and then further testified that on April 3, 1953 there was on deposit in the bank at Batesville in Special Account No. 1, $119,230.31 and that this was recouped by the Government. This money was part of the advances made by the Government against the requirements shown in the flow sheets and it was to be used for the purpose of paying for commitments and purchases made by Westmoreland for completion of its contract for the erection of the plant and for items required to be purchased under the said flow sheets (tr. 1594)

(The Government did not cross-examine witness, counsel for Government saying "we doubt if we will put on any evidence to the contrary". (tr. 1595) ).

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[fol. 26] Conclusions Of Law Requested By The United States Of America:

This Court has jurisdiction of the subject matter involved and the parties to this action.

The original Letter Contract No. GS-OOP(D)-12263, executed on April 7, 1952, and more particularly described in the Findings of Fact and introduced into evidence, is a valid contract based upon a valid consideration and by reason of the said agreement, the parties became bound to perform according to the terms thereof.

The mortgage note in the principal sum of $3,807,250.00, executed and delivered by Westmoreland Manganese Corporation to the plaintiff on May 22, 1952, was executed pursuant to the original Letter Contract and for a good and sufficient consideration and is a valid and binding obligation.

The Real Estate and Chattel Mortgage and the Supplemental Mortgage, executed and delivered by the defendant, Westmoreland Manganese Corporation, to the plaintiff on May 22, 1952, and referred to in the Findings of Fact and introduced into evidence, were executed pursuant to the original Letter Contract for good and sufficient consideration and are valid and binding obligations.

The Real Estate and Chattel Mortgage and the Supplemental Mortgage in favor of the plaintiff constitute a first lien upon all of the property described by these instruments and constitute security for all the advances made by the plaintiff. Those instruments constitute a first lien upon all property acquired by the defendant, Westmoreland Manganese Corporation, after the execution and recordation of said mortgages. Said mortgages constitute a lien in favor of the plaintiff, which is first, prior, paramount, and superior to the liens and interest of all other parties to this action, upon all of the property of the defendant, Westmoreland Manganese Corporation, real, personal, and mixed, including but not limited to cash, choses in action, causes of action, claims, debts, and obligations, whether liquidated or not; and all property and interests in property belonging to said defendant, Westmoreland Manganese Corporation, whether now reduced to possession or not.

The contract entitled "Amendment No. 1" executed by the parties on April 2, 1953, and introduced into evidence is a valid and binding agreement based upon a good and sufficient consideration and created the rights and obligations therein set forth.

Under said Amendment No. 1, executed on April 2, 1953, the plaintiff was given the unqualified right and privilege of terminating the contract at any time up to the commencement of production upon a determination by it that said determination was in its best interest.

By giving notice of termination of the contract under Amendment No. 1, the indebtedness then owing by the defendant, Westmoreland Manganese Corporation, to the plaintiff was accelerated, and said advances became immediately due and payable, and the said mortgages became subject to foreclosure.

Under the provisions of Amendment No. 1, dated April 2, 1953, the government was given the unqualified right to terminate the contract without thereby being liable in any way for any damages to the defendant, Westmoreland Manganese Corporation.

The government never defaulted or breached any obligation which it had under the original letter contract with the defendant, Westmoreland Manganese Corporation, or under the Mortgage Note or Real Estate and Chattel Mortgage or Supplemental Mortgage or Amendment No. 1 to the Contract.

Although demand was made upon the defendant, Westmoreland Manganese Corporation, it has failed to repay any of the advances made by the plaintiff under the agreements and that the defendant, therefore, is indebted to the United States in the principal sum of $2,877,096.50 and accrued interest of $159,639.19 as of January 8, 1954. Interest accrues on the principal balance at the rate of $315.288 per day.

That the plaintiff is entitled to judgment as prayed in its complaint in the amount of $ ....., which includes principal in the amount of $2,877,096.50, interest as of Jan

uary 8, 1954 in the amount of $159,639.19, and interest thereafter at the daily rate of $315.288 until the date. Plaintiff is entitled to interest on said judgment, after the date of said judgment, at the rate of Six Per Cent (6%) per annum until paid.

If the said judgment is not paid within a reasonable time, as set out therein, plaintiff will be entitled to have all of the properties of the defendant, Westmoreland Manganese [fol. 28] Corporation, sold by a Commissioner appointed by this Court for that purpose.

Amendment No. 1 to the original letter contract contemplated that the government would advance funds to Westmoreland Manganese Corporation in amounts different from, and for purposes other than, those contemplated under the original letter contract. The plaintiff under said agreement obligated itself to do certain things which it was not obligated to do under the original Letter Contract GS-OOP(D)-12263.